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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/799,354	03/12/2004	Maurice Clarence Kemp	108347.00074 (MORN-0015)	6352
25555	7590	04/25/2006	EXAMINER PRATT, HELEN F	
JACKSON WALKER LLP 901 MAIN STREET SUITE 6000 DALLAS, TX 75202-3797			ART UNIT 1761	PAPER NUMBER

DATE MAILED: 04/25/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/799,354

Applicant(s)

KEMP ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-124 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-124 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Richter et al. (5,419,908).

Richter et al. disclose a process of making a food additive microbial composition by contacting the food with acids such as benzoic (claims 1, 2) and inorganic acids such as phosphoric and sulfuric as in claims 1-8 (col. 1, lines 10-20, col. 9, lines 30-45). The pH is from 2.5 to 5.5 (col. 20, lines 1-35). Claims 1, 3, 4, 7 differ from the reference in the particular amounts of inorganic and organic acid. However, it is seen that it would have been within the skill of the ordinary worker to use particular amounts of known acids for their known function. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing an acid containing bactericide, properties such as amounts of acids are important. It appears that the precise ingredients as well as their proportions affect the preservation and shelf life of the product, and thus are result effective variables, which one of ordinary skill in the art would routinely optimize.

Claims 9-39, 51-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Richter et al as applied to claims 1-8 above, and further in view of Kemp (6,436,891).

Claim 9 further requires the use of a monobasic salt of phosphoric acid. However, Kemp discloses adding sulfuric acid to calcium hydroxide and an additive, which can be used in a food production as in claim 9-13, 20 (abstract). The particular amounts as in claims 14-19 are seen as being within the skill of the ordinary worker as it is well known that acidic conditions reduce microbes and bacteria. Therefore, it would have been obvious to use the metal salts of Kemp in the composition of Richter et al for the function of reducing the level of bacterial contamination.

Claims 21-27 further require that the metal salt is one of an organic acid and claim 22 is made by adding a base material to the acid. Kemp et al. disclose that it is known to combine an inorganic acid with a base (abstract). However, nothing new is seen in using an organic acid instead of an organic acid as they both combine with a base. The particular amounts are seen as being within the skill of the ordinary work. See In re Boesch above. Therefore, it would have been obvious to make a product using an inorganic acid instead of an organic acid for their known functions.

Claim 28 further requires the use of an alcohol and claim 29 that it is ethanol. Kemp discloses that 0.5% ethanol and lactic acid can reduce microbes as in claims 28-32. Therefore, it would have been obvious to use alcohol with acids in the combination of the combined references (col. 18, lines 56-60).

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Claim 33 further requires the use of a surfactant and 34 that it is anionic and claim 35 the use of polysorbate. Kemp discloses the use of an anionic surfactant and polysorbates. The limitations as to the above are disclosed in col. 10, lines 23-48 to achieve a pH of 1.8. The particular amounts as in claims 36-38 are seen as being within the skill of the ordinary worker. Therefore, it would have been obvious to use surfactant in particular amounts in the composition of the combined references.

Claim 39 further requires the use of oleic acid. However, various acids have been disclosed by the combination of references. Nothing new is seen in the use of oleic acid absent a showing to the contrary. Therefore, it would have been obvious to use various acids in the composition of the combined references.

Claims 45-49 are to in ready- to- eat food products and claim 50, a dough. As the above combination of references is food products nothing is seen that the claimed combinations of ingredients as shown above could not be used for the instant claimed products.

The limitations of claims 51-55 have been disclosed above and are obvious for those reasons.

Claims 40-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims above, and further in view of Hei et al (6,627,593).

Claims 40-44 further require particular amounts of peroxides. Hei et al disclose the use of hydrogen peroxide, acids and surfactant in an antimicrobial solution for food products (col. 3, lines 6-20). The particular amounts of amounts are seen as being

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within the skill of the ordinary worker. Therefore, it would have been obvious to use known antimicrobial solutions containing peroxides in the composition of the combined references.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 56-124 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over all claims of U.S. Patent No. 6,572,908 and 6,808,730. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the above patents encompass the instant limitations.


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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 4-21-06


HELEN PRATT
PRIMARY EXAMINER